(38)

No. 493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IDAHO POTATO GROWERS. INC.; W. P. WILSON; L. S. TAUBE, TED TAUBE and L. B. HOLDEN, Co-partners, doing business as L. S. TAUBE & COMPANY; MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, Co-partners, doing business as S. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAH O'NEIL, Administratrix of the Estate of J. E. O'Neil, deceased; A. G. STUART; C. R. HOLDEN and L. L. HOLDEN, Co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

and

BRIEF IN SUPPORT OF PETITION

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

---

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The petitioners, IDAHO POTATO GROWERS, INC.; W. P. WILSON; L. S. TAUBE, TED TAUBE and L. B. HOLDEN, co-partners, doing business as

L. S. TAUBE & COMPANY; MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, co-partners, doing business as S. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAH O'NEIL, Administratrix of the Estate of J. E. O'Neil, deceased; A. G. STUART; C. R. HOLDEN and L. L. HOLDEN, co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION, respectfully pray that a writ of certiorari be issued to review the decision (R. 749) and decree (R. 798) of the United States Circuit Court of Appeals for the Ninth Circuit entered June 30, 1944, affirming the decision and order of the National Labor Relations Board of April 10, 1943 (R. 69-76) in which the National Labor Relations Board affirmed the finding of the Trial Examiner for the Board that the employees of the Petitioners were not agricultural laborers (R. 88-92).

Opinions Below

On January 9, 1943 the Trial Examiner for the defendant Board filed his intermediate report (R. 77-149) with the Board. Upon the petition for review filed by the Petitioners (R. 150), and the answer of the Board (R. 163-171) the Board entered its decision and order on the 10th day of April, 1943 (R. 69-76).

A petition for review was addressed by the Petitioners to the Ninth Circuit Court of Appeals (R. 150-162), and on June 30, 1944 the Ninth Circuit Court of Appeals affirmed the order and decision of

the Board (R. 749), (..... Fed. (2d) .....) and entered a decree in the nature of a mandatory injunction (R. 798).

Jurisdiction

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., 347) and under section 10(e) of the National Labor Relations Act of 1935 (29 U.S.C.A. 160(e)).

Statutes Involved

The statute involved is the National Labor Relations Act of 1935 (49 Stat. 450; 29 U.S.C.A., Secs. 151-166), and particularly section 2(3) of said Act which subsection, in defining 'employee' and the non-coverage of certain employees, states:

> "but shall not include any individual employed as an agricultural laborer."

(For sections, see appendix.)

Statement of Facts

The employers involved in this case are in three classifications: (1) those who are dealers only; (2) those who are farmers and dealers, and (3) Idaho Potato Growers, Inc., which is a co-operative association and does not buy potatoes but markets the same for its members (R. 85).

The potatoes are graded, weighed and sacked in

two classes of places: (1) About ninety percent of the potatoes processed by some of the petitioners are originally handled and processed in the cellars of the farmers on the farms where they are grown (R. 90); (2) the balance are processed in the warehouses of the dealers (R. 89).

The cellar crews are those that work in the farmers' cellars on the farms where the potatoes are grown, and the warehouse crews are those that work in the warehouses of the dealers. The cellar crews are composed in part of regular farm employees of the farmer, the farmer himself in many instances being a member of the cellar crew (R. 90). Most of the farmers own their own sorting machines (R. 226). The grading and sorting does not change the form of the potatoes.

The equipment used to sort potatoes is a simple, power-driven elevator called a sorter (R. 88). The employees on a crew usually consist of four sorters (who pick out culls, etc.), one scooper (who places the potatoes on the elevator), a jigger (who sacks and weighs), a sack sewer, and a swamper (who removes culls, etc.) (R. 88-89). Regular experienced farm hands on the farms where the potatoes are grown perform any or all of the above named duties (R. 665). When the farmer does not have enough of his regular farm help to make up a crew he fills it up with others (R. 665).

Under the decision and decree of the lower court five of the petitioners who own and operate their own farms, plant, cultivate and harvest the potatoes grown thereon, and prepare the same to meet the required grade in their own cellars, on their own farms and use their own equipment, are compelled to negotiate with the Union for all of their employees working in their cellars regardless of whether they work elsewhere or ot. Almost all of the potatoes, whether grown on the petitioners' farms or not, receive the first processing in the cellars on the farms. Approximately ninety percent of the potatoes handled by some of the petitioners are graded and packed in the growers' cellars (R. 89).

All of the petitioners (except Traffic Association) are connected with the production, harvesting or marketing of potatoes at Idaho Falls, Idaho, and adjacent points. Of the nine petitioners, five are engaged in farming and in the production of potatoes on their own farms (R. 82-88), and Petitioner, W. P. Wilson, during 1941-1942 produced on his farm about 65 carloads of potatoes which he processed on his farm and also maintained a warehouse from which he shipped about 385 carloads of graded potatoes of others (R. 83-84). All of the potatoes grown on his own land were harvested and sorted by a cellar crew of his own employees on his own land (R. 186; 275).

Petitioner Stuart, during 1941-1942, produced on his own farm ten carloads of graded potatoes and also

shipped about 190 carloads of graded potatoes of others (R. 86).

Petitioner O'Neil produced in 1942-1943 about 15% of the total amount of graded potatoes shipped on her own farm and she shipped about 800 carloads during said period (R. 277).

Petitioner Idaho Falls Bonded Warehouse Company, a family corporation, (R. 262) produced on the farms of the family from 15% to 35% of the entire amount of potatoes handled by it, and during 1941-1942 it shipped a total of 700 carloads of graded potatoes (R. 263-264; 266-267); a large part of the potatoes grown on the farms of the family are packed by their employees who work on their farms the year round (R. 266).

Petitioner Holden Brothers produced on its own farms about 65% to 70% of the entire amount of potatoes handled by it, and during 1941-1942 shipped a total of 739 carloads of potatoes (R. 185-186). In addition, petitioner Holden Brothers' principal occupation is that of general farming and stock raising (R. 185).

Most of the employees of petitioner Holden Brothers work on its farms the year round doing general farm work and sometimes in the wintertime work in the warehouse of the petitioner when they cannot work on the farm (R. 186; 513).

Petitioner Idaho Potato Growers, Inc., a non-profit

association, incorporated under the cooperative marketing statutes of the State of Idaho (R. 85), does not buy the potatoes which it handles but ships them for the accounts of the farmers and makes a final settlement at the end of the season (R. 83). The farmers own the potatoes until finally disposed of in markets over the country.

Of all the other employees involved, a large percentage are regular farm laborers, some of them on the farms of petitioners, others on farms of the members of the association, and others in the immediate vicinity where the crops are harvested (R. 231).

Ownership of the potatoes continues in the growers until U. S. No. 1 grade is attained by means of the labor of the employees here involved. In the case of such of the petitioner-dealers, who do not produce any of their own potatoes, and of those producer-dealer petitioners, who, in addition to handling their own, purchase potatoes from other growers, ownership of the potatoes does not pass from such other persons until U. S. No. 1 grade has been determined, and title to the potatoes only that attain such grade passes, and in the case of potatoes handled by the Potato Growers, Inc., title does not pass until finally purchased by some consignee (R. 258-259). In all instances, the balance of the potatoes, such as culls and those not reaching the required grade, remain the property of the grower.

The prices which the grower receives for his crop when not sorted and sacked by his regular farm labor is subject to reduction by the sorting and packing costs incurred by the dealer, who normally pays the wages of the potato workers and deducts the amount of the payment from the price which would otherwise be payable to the growers (R. 273; 190-191-194; 233; 664-665; 692-693). Occasionally, a grower pays the wages of the member of a regular crew of potato workers with his own check (R. 693). In other words, the farmer always bears the expense and cost of the labor and employees herein involved, whether the work is done on the farm or in the warehouse.

When a petitioner-dealer purchases a farmer's potatoes, he agrees to take such of them as make U.S. Grade No. 1; he sometimes sends a crew out to the farmers' cellar to sort and sack the U. S. Grade No. 1 potatoes.

At times the dealer does not send out a complete crew because the farmer himself works as a member of the crew and at times the farmer has one or more of his own farm hands work as members of the crew (R. 90.) The farmer bears the cost of the sorting and sacking.

The farmer has such control over all crews working on his farm, handling his potatoes, that he can stop the crew from working until his grievances are adjusted (R. 91).

The Board filed one complaint against all of the petitioners, including Idaho Potato Growers, Inc., a non-profit cooperative association, Idaho Traffic Association, which neither produced, sold or handled potatoes, the petitioners who produced the potatoes, and strictly dealers in potatoes (R. 43-57). The petitioners, jointly and severally, have continuously objected to this consolidation (R. 60; 82).

The lower court and the Board charged and held that the protest meetings held by the farmers who are not parties were unfair labor practices on the part of Petitioners, which protest meetings were merely an assertion by the farmers of their rights to non-coverage granted them by the Act (R. 94; 121).

The Board found that both the farm cellar crews and warehouse crews of each and every petitioner (except Traffic Association), exclusive of foremen and supervisory employees, together and without distinction, constitute units appropriate for collective bargaining (R. 71). The Board ordered the Petitioners to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of the employees of the Petitioners in each of the units found by the Board to be appropriate (R. 72), and to cease and desist from in any manner interfering with, restraining, or coercing the employees of the Petitioners in the exercise of their rights as guaranteed by Section 7 of the Act (R. 72). The lower court did likewise by its decree (R. 798).

The Board ordered all of the Petitioners (exclusive of Petitioner, Traffic Association) to bargain collectively with the Unions "as the exclusive representative of all of the employees of respondent dealers in each of the units found above to be appropriate with respect to rates of pay wages, hours of employment, and other conditions of employment" (R. 73). The court entered its decree ordering Petitioners to do what the Board had ordered as to "the employees of Petitioner-dealers in each of the units found above to be appropriate for the purposes of collective bargaining" (R. 799). No distinction was made by the Board or the court between cellar crews and warehouse crews; and the court in its decree does not define what is meant by the words "in each of the units found above to be appropriate."

The Circuit Court affirmed the above order (R. 749) and granted the petition of the Board for its enforcement (R. 798).

The petitioners who are engaged in farming are now confronted with an order of the Circuit Court compelling them to bargain collectively with all of their employees who happen to work in the farm cellars on the petitioners' farms, using petitioners' equipment, and sorting petitioners' potatoes, even though said employees may have worked for the respective farmers throughout the entire year, and may have assisted in planting, cultivating and harvesting the

identical crops which they also assist in cleaning and grading.

Reasons Relied On For Allowance of Writ

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court.

(a) It has decided that laborers (known as cellar-men) engaged in cleaning, culling, grading and sacking potatoes without changing their character from raw farm produce (commonly called "processing" or "grading") on the farm where produced, for and at the expense of the farmer-producer are not "agricultural laborers" excepted from the National Labor Relations Act, and that they and their employers are subject to such Act and the jurisdiction of the National Labor Relations Board.

(b) It has decided that such laborers (cellar-men), so engaged on such farm for and at the expense of such farmer, as in (a) above, where such farmer also further "processes" or "grades" potatoes grown and owned by other farmers, at their expense, at warehouses, are not "agricultural laborers" excepted from the National Labor Relations Act, and that both the laborers at the farm (cellar-men) and at the warehouse (warehouse men) are a single bargaining unit, and are, and said farmer is, subject to such Act and the National Labor Relations Board.

(c) It has decided that laborers (warehouse men) engaged in "processing" or "grading" potatoes identically with such work on a farm for a farmer, when done in a warehouse owned and operated by a co-operative organization of farmer-producers, and upon potatoes owned by producer-members, and at the farmer-producer-member's expense, are not "agricultural laborers" excepted from the National Labor Relations Act, and that both the co-operative and such laborers are subject to such Act and the National Labor Relations Board.

(d) It has decided that laborers (whether cellarmen or warehouse-men) so engaged in "processing" or "grading" potatoes at the expense of a farmer-producer, when done on a farm, or in a warehouse owned and operated by a person who buys, or as the agent of such farmer-producer procures a buyer for, that portion of the potatoes found, by such "processing" or "grading", to be U. S. No. 1 grade, are not "agricultural laborers" excepted from the National Labor Relations Act, and that all such laborers and said warehouse owners are subject to such Act and the National Labor Relations Board.

(e) It has decided that all such foregoing laborers are in a single category, without distinction, for bargaining purposes.

(f) It has decided that all such foregoing farmer-producers, farmer co-operatives, farmer-producer-

warehouse owners, warehouse-owners and warehouse-owner-buyers or agents, together with traffic associations, without any such employees, may be jointly guilty with respect to all such laborers jointly, whether on farm or in warehouse, of unfair labor practices, and that they may be joined in one proceeding.

(g) It has by its decision denied to farmers the protection of the National Labor Relations Act, by subjecting them and their employees to such Act and Board, notwithstanding the exception of "agricultural laborers" from said Act; and has denied farmers and farmer organizations the right of free speech guaranteed by the first amendment to the Constitution of the United States of America—and has so interpreted the words of exception, "agricultural laborer", in the National Labor Relations Act, as to constitute said Act as a law of Congress abridging the freedom of speech.

(h) It has decided that meetings of farmer-producers protesting unionization of such laborers constitute unfair labor practices; and has ordered collective bargaining with respect to all such laborers, and all such employers, without distinction.

(i) It has defined and applied the general term, and exception, of "agricultural laborer" as contained in the National Labor Relations Act, differently from and in conflict with the definition of identical or substantially identical terms, and exceptions, in the Fair Labor Standards Act (Title 29, Sec. 213, U. S. C. A.),

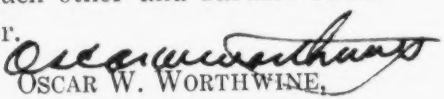
and Social Security Act (Act of August 14, 1935, Chap. 531, Title IX, Sec. 907-49, Stat. 642), resulting in confusion as to the meaning and coverages of the three acts when applied to the same operations, employers and employees.

(j) It has defined and applied the general term, and exception, of "agricultural laborers" as contained in the National Labor Relations Act, differently from and in conflict with the local law, custom and understanding within the State of Idaho in and with reference to the identical, or substantially identical operations, employers and employees (Batt v. Unemployment Compensation Division, 63 Idaho 522, 123 Pac. (2d) 1004; Big Wood Canal Co. v. Unemployment Compensation Division, 61 Idaho 247, 100 Pac. (2d) 49; 63 Idaho 785, 126 Pac. (2d) 15; Carstens v. Ind. Acc. Bd., 63 Idaho 613, 123 Pac. (2d) 1001, ... Idaho ....., 144 Pac. (2d) 203; Smythe v. Pheonix, 63 Idaho 585, 123 Pac. Pac. (2d) 1010; Cook v. Massey, 38 Idaho 264, 220 Pac. 1088.)

(k) It has entered a decree for a mandatory injunction which is vague, indefinite and uncertain.

WHEREFORE, Your petitioners pray that a Writ of Certiorari be issued in the above named cause under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit, City of San Francisco, California, commanding said court to certify and send to this Court for its review and determination on a day certain therein named, a full

and complete record of all proceedings in the case numbered and entitled on its No. 10490, Idaho Potato Growers, Inc., et al, Petitioners versus National Labor Relations Board, Respondent; and that the said judgment of said Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that your petitioners be granted such other and further relief as may be just and proper.



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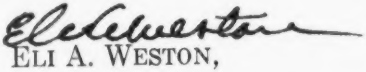

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OCTOBER TERM, 1944

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion and Decree of the Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit, which the petitioners now seeks to have reviewed by this Court, is contained in the record at pages 749 to 797, and the decree is contained in the record at pages 798 to 803. The order of the court is found in the record at page 798, and as findings the court adopted the findings of the trial examiner (R. 788).

Jurisdiction

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by

the Act of February 13, 1925 (28 U. S. C. A. 347) and under section 10(e) of the National Labor Relations Act of 1935 (29 U. S. C. A. 160(e)).

Statement

Statement of the pertinent facts in this case is made in the foregoing petition on pages 3 to 11.

Specifications of Error

The errors which the petitioners will urge, if the writ of certiorari is granted, are that the Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(1) In holding that laborers engaged in cleaning, culling, grading and sacking potatoes without changing their character from raw farm produce, on the farm where produced, and at the expense of the farmer-producer, are not agricultural laborers within the meaning of the National Labor Relations Act.

(2) In holding that laborers engaged in grading and sacking potatoes for the farmers, on the farm where produced, are not agricultural laborers excepted from the National Labor Relations Act, where it happens that such farmer also owns a warehouse in which other employees grade and sack potatoes grown and owned by others.

(3) In holding that both the laborers on the farm and at the warehouse are a single bargaining unit,

and are, and said farmer is, subject to the National Labor Relations Act.

(4) In holding that laborers engaged in grading and sacking potatoes identically with such work on a farm for a farmer, when done in a warehouse owned and operated by a cooperative organization of farmer-producers, and upon potatoes owned by farmer-producers, and at the farmer-producer's expense, are not agricultural labors within the meaning of the Act.

(5) In holding that laborers, engaged in grading and sacking potatoes at the expense of the farmer-producer, when done on a farm, or in a warehouse owned and operated by a person who buys only the portion of the potatoes attaining grade known as U. S. No. 1, are not agricultural laborers.

(6) The court erred in holding that the farmer-producers, farmer cooperatives, farmer-producer-warehouse owners, warehouse owners and buyers, together with traffic associations, may be joined in one action and proceeding and may be guilty of unfair labor practices.

(7) In holding and deciding that meetings of farmer-producers protesting the unionization of agricultural laborers constituted unfair labor practices, and in ordering collective bargaining with respect to all such laborers, and all such employers, without distinction.

(8) In holding that a demonstration of farmers at their public meetings, held in protest of the unionization of their employees, constituted unfair labor practices, and in so holding, by implication, extended the National Labor Relations Act so as to constitute a denial of the right of free speech to farmers in violation of the first amendment to the Constitution of the United States.

(9) In entering a decree for mandatory injunction which is vague, indefinite and uncertain.

(10) In holding that a laborer who works regularly on a farm is not an agricultural laborer because during the packing season he *prepares* the product of the soil *for market.*

(11) In holding that the doctrine in the case of North Whittier Heights Citrus Ass'n vs. NLRB, 9th CCA, 109 Fed. (2d) 76 is applicable to the facts in this case.

(12) In holding that the "common denominator" theory of construing the exceptions in the Act of Congress is applicable in this case.

(13) In failing to apply the term "agricultural laborer" as found in the National Labor Relations Act, in harmony with the identical term in other Federal Acts, i.e., Fair Labor Standards Act and Social Security Act, and in harony with the identical term as understood and applied locally, i.e., within the State of Idaho.

Argument

I.

WHERE ONE OWNS A FARM AND EMPLOYS PERSONS TO PLANT, CULTIVATE, HARVEST AND SORT THE POTATOES GROWN ON THE FARM AND THE SORTING IS DONE ON THE FARM, THE EMPLOYEES ARE AGRICULTURAL LABORERS WITHIN THE MEANING OF SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT.

Section 2(3) of the Act excludes from coverage "agricultural laborers"; yet, the Board ordered, and the Court by its enforcing order is compelling, the petitioners who are also farmers to deal with all of their employees collectively who work on a farm cellar crew even though the crew may include the farmer himself; and even though the farmer is sorting potatoes grown by him on his own farm and the sorting is performed on the farmer's own farm where the potatoes have been grown, and his crew members are his regular farm hands who have helped plant, cultivate and harvest the identical potatoes being sorted.

Judge Fee, who concurred in the majority opinion solely on the assumption that farm cellar crews were not included in the order (R. 797) (an assumption unfounded) stated the point very clearly when he said:

"As a specific example of the application of the

doctrines to one phase of this case, W. P. Wilson grew on his own land, certain potatoes which he harvested and sorted by means of a cellar crew in his own employ on his own land. If the implication of the findings of the Board, as affirmed by the majority, are that he must employ a union crew under such circumstances simply because he also warehouses and sells potatoes bought from others, then no potato grower in Idaho can escape regulation, notwithstanding the plain language of Congress. If as realists, we take any account of the facts, there is then no obstacle to the extension of like organization and regulation of agricultural laborers in the operations of planting the seed and preparing the ground.

"The findings of the Board that members of the cellar crew engaged under such circumstances in the work of the farm, were not agricultural laborers, accords neither with the fact nor the law. This court should not lend support to such doctrine based on the fanciful analogy of other cases, or at all." (R. 794.)

The above statement is also applicable to the petitioners Stuart, Holden Brothers, O'Neil, and Idaho Falls Bonded Warehouse, a family corporation.

The word "agriculture" is a most comprehensive word. It is the science and art of cultivating the soil and growing produce, including every process and step

incident to the completion of the products for consumption and market. It is broader than farming and includes the raising and harvesting of crops and all things incident thereto.

> 2 Am. Juris. 395; *Stuart, Collector vs. Kleck*, 129 F. (2d) 400 (9th C.C.A.); *Gaylord Guernsey Farms vs. Jones*, 41 Fed. Supp. 367; *Smythe vs. Pheonix*, 63 Idaho 585; 123 Pac. (2d) 1010; *Batt vs. Unemployment Compensation Div.*, 63 Idaho 572; 123 Pac. (2d) 1004; 139 A.L.R. 1157; *United States vs. Northern Pacific R. Co.*, 311 U. S. 317 at 361, 85 L. ed. 210 at 235; *Big Wood Canal Co. vs. Unemployment Compensation Div.*, 61 Idaho 247; 100 Pac. (2d) 49; *Cook vs. Massey*, 38 Idaho 264; 230 Pac. 1088; 35 A.L.R. 200.

It is respectfully submitted that the court below, by its opinion and decree, has erroneously interpreted and applied the words "agricultural laborer" in this case, and if its order stands will compel these petitioners, as farmers and engaged in farming, to deal collectively through the Union with their farm employees, when such result was never the intention of Congress when the Act was passed.

II.

THE FACT THAT A FARMER, WHO GROWS HIS OWN POTATOES ON HIS OWN LAND, ALSO WAREHOUSES AND SELLS POTATOES GROWN BY OTHERS, DOES NOT MAKE HIS CELLAR

CREWS WHO PREPARE HIS OWN POTATOES, IN HIS OWN CELLARS, ON HIS OWN LANDS, NON-AGRICULTURAL LABORERS.

The Board and the lower court disregarded the distinction that should have been made between the crews that worked in the warehouses away from the farms and those crews that worked in the cellars on the farms, and as a result of the affirmance of the order by the lower court and the issuance of its injunction, the petitioners, who are also farmers, are confronted with a mandatory order, which, if carried to its logical conclusion, will force the farmers to recognize the Union in dealing with each and every one of their farm employees who happens to be a member of a cellar crew working in their own cellars and sorting their own potatoes.

III.

THE LOWER COURT HAS PROJECTED THE NATIONAL LABOR RELATIONS ACT INTO THE RELATIONSHIP OF THE FARMER TO HIS FARM LABOR.

The lower court based its decision that the employees in this case were not agricultural laborers, and hence not excepted from the Act, upon its own decision in North Whittier Heights Citrus Association v. National Labor Relations Board, 109 Fed. (2d) 76 (Cert. denied, 310 U.S. 632). The "big business" aspect of the operations in the latter case was determinative of

the court's definition of agricultural laborer—again and again the court emphasizes the size of the operations—"the vast and comprehensive system"; the "large industry" separated from the farm; the common denominator of smallness in the Act's exceptions; the farmer and his "hired man"—the "great industry" —the control of "a great selling organization." In that case one operator, the Association, encompassed the whole field; all similar operations of the area were consolidated into one place off the farm, under one management, at one time, with one group of laborers.

Assuming, for argument, that such conditions justified exclusion of the laborers therein involved from the generalization "agricultural laborers" contained in, and excepted from the National Labor Relations Act, no like conditions prevail in this case.

Here is no "vast and comprehensive system", "great industry", "great selling organization" processing potatoes at a single central place off the farm with a single group of laborers. On the contrary here is just the opposite. Here are nine separate persons or entities within a single area; here are small separate crews—here is labor performed in the numerous individual cellars, on the individual farms, for and at the expense of the individual farmer, upon the individual farm produce, frequently by the farmer himself, his hired men, his neighbors. Here is not "product of the soil (leaving) the farmer, as such, and (entering) a factory for processing and marketing * *"

True, processing was also accomplished for other producers in the several and separate warehouses of petitioners, and, though we think this too was agricultural labor and excepted from the Act, if, for the moment and for argument, it be true that the workers in the warehouse were not agricultural laborers and that the North Whittier Heights case was applicable to them, it does not follow that for that reason the farm cellar workers on the individual farms lost their status as agricultural laborers, or the individual petitioner farmers and producers lost their status as such as to their own produce, self-processed, and their farm cellar men.

The court has misapplied its own reasoning and definition, and the Board and the court by the joinder and confusion of the complaints, the laborers, the petitioners, and the conditions, has limited and circumscribed the meaning of "agricultural laborer" beyond all common understanding and intention of Congress, and has projected the National Labor Relations Act into the relation of the farmer with his employees on the farm.

That size of operation was not the Congressional test of agricultural labor is indicated by the Committee Report (Senate No. 573, May 2, 1935, 74th Cong. 1st Sess.) from which is quoted:

> "For administrative reasons the committee deemed it wise not to include under the bill agricultural laborers * * * But after deliberation, the

committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work * * *"

The "common denominator" theory of exemption used by the lower court is directly contrary to such expressed intent of Congress, and has no bearing upon the definition of "agricultural laborer".

Exemptions from the operation of a statute made in detail preclude their enlargement by implication.

Addison v. Holly Hill Fruit Products, 88 L. Ed. Advance Opinions No. 16, p. 1123.

IV.

THE LOWER COURT HAS USED A WRONG BASIS FOR ITS DETERMINATION OF THE MEANING OF "AGRICULTURAL LABOR", AND DEFINED THE TERM IN CONFLICT WITH ITS ACCEPTED MEANING IN THE STATE OF IDAHO, AND BY CONGRESS.

As hereinbefore stated the lower court bases its order against petitioners upon its definition of agricultural labor as contained in its own decision in the North Whittier Heights case. It reasoned in that case that processing fruit was not intended by Congress to become within the exception of agricultural labor largely because of the large size of the operation—that if the operation was large, and off the farm, the labor,

though identical in character and purpose and though performed for the individual farmer at his expense, and though a necessary operation in the production of a finished, marketable product of the soil, ceased to be agricultural. By so doing it imposed an unequal burden upon farm produce and discriminated between farmer and farmer, and identical produce.

Applied to potatoes, involved in this proceeding, both producer A and producer B are required, in order to move potatoes off the farm and make them usable, consumable, saleable farm produce, to process them, that is to say, to separate the potato from dirt, vines, etc., to discard cut, bruised, ill shapped and cull potatoes, to grade according to the requirements of the State and Federal laws and agencies. So far as nature is concerned a potato is fully matured, grown and produced underground, but is useless and unfinished until harvested. Harvesting is beyond doubt agricultural labor, yet it only raises the potato above ground; in the mass the potatoes harvested are not consumable, nor marketable; they must as a necessary, and legal, incident to the farmer's completion of production for market, be processed. That processing is well understood to be an agricultural operation. Sometimes it is done on the farm by the farmer and his self hired crew, (producer A) particularly by the large owner or producer who is best able to gather a crew and furnish employment for larger crews for a longer time on large production. The smaller producer or

farmer (producer B) cannot so well himself perform this necessary operation; he must procure it by co-operation action, the forming of co-operative organizations, or by bringing his field run produce into a central warehouse where his and the produce of others can more economically be handled. Yet in all cases the produce is the farmers until processing is completed (after which the part reaching the required grade, enters the market, and the balance remains the farmer's), and in all cases the expense of processing is borne by the farmer.

Now clearly producer A and his employees though perhaps large in number are engaged in agricultural labor and excepted from the Act. Under the North Whittier Heights case the lower court has denied the exception to producer B and his labor. Under the present decision in the petitioners' cases both conditions exist and the petitioners and their laborers whether on or off the farm, are massed by the court into a whole, treated as a single bargaining unit and the whole denied the exception of the Act.

In Idaho under either conditions the labor is and has been recognized and understood to be agricultural labor. Thus where Batt was a producer of vegetables, including potatoes, which he processed at processing sheds off the farm; also at such sheds processed the produce of others; also purchased the graded produce; also acted as selling agent for graded produce of others —the Idaho Supreme Court held that the labor involved

in processing all such produce was agricultural labor within that general term as used in the exception to the Unemployment Compensation Act, which at that time was identical with the National Social Security Act and the term in the National Labor Relations Act. Batt v. Unemployment Compensation Division, 63 Idaho 572, 123 Pac. (2) 1004.

The Idaho Supreme Court has held threshing to be agricultural labor. Cook v. Massey, 38 Idaho 264, 220 Pac. 1088. The lower court here based its decision on its North Whittier Heights case, upon the decisions of other jurisdictions contra. The lower court also here based its decision upon its own National Labor Relations Board v. Tovrea Packing Co., 111 F. (2) 626, holding feeding lot operations non-agricultural. In Idaho the contrary is the customary and usual idea of what is agricultural labor where such general term only was used in the statutory exception. Carstens v. Ind. Acc. Bd., 63 Idaho, 613; 123 Pac. (2) 1001. Smythe v. Phoenix, 63 Idaho 585, 123 Pac. (2) 1010. So in Idaho employees of a farmer co-operative delivering water for irrigation are engaged in agricultural labor, excepted from Unemployment Compensation Laws, where only the general term was used in the statute. Big Wood Conal Co. v. Unemployment Comp. Div., 61 Idaho 247. See also as to agricultural labor, under more specific statutory definition, Big Wood Canal Co. v. Unemployment Compensation Division, 63 Idaho 785, 126 Pac. (2) 15; Carstens Packing Co.

v. Unemployment Compensation Division, ... Idaho .....; 144 Pac. (2) 203.

The lower court in this case (since its definition of agricultural labor is based on the North Whittier Heights case) adopted as one criteria of such labor "common usage".

> "Enlarge the meaning of any of these terms beyond their common usage and confusion results."

and

> "the usual idea that the term suggests."

In the instant case the lower court has decided what is agricultural labor in Idaho contrary to, and in conflict with, comon usage and the usual idea, as expressed by the Supreme Court of Idaho and has thereby introduced confusion.

Another criteria of the lower court was the size of the operation—a most uncertain measure, since size is a relative conception, and most likely to result in confusion even between localities within the same area. Out of this came the courts conception of intent of Congress by virtue of a so-called "common denominator" between exceptions from the Act, such denominator being size or extent—if large it was not agricultural labor, if small, it was. But Congress itself repudiated both "common denominator" and size, as tests of inclusion or definition;

> "For *administrative* reasons the committee

deemed it wise not to include under the bill *agricultural laborers*, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the Committee decided *not to exclude employees working for very small employer units.* The rights of employees should not be denied because of the *size* of the plant in which they work. Section 7 (a) (National Industrial Recovery Act) imposes no such limitations. * * *" (Emphasis ours.)

Senate Rep. No. 573, May 2, 1935, 74th Cong. 1st Sess.

In respect to the Social Security Act (equally applicable to the National Labor Relations Act) the Fifth Circuit Court of Appeals said of the general term "agricultural labor":

"Congress * * must be regarded as having in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When, then, Congress in passing an act like the Social Security Act, uses in laying down a broad general policy of exclusion, a term of as general import as "agricultural labor", it must be considered that it used the term in the sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, *as that term is understood in the various sections of the United States where the Act*

operates * * it must be interpreted broadly enough to embrace in it all kinds and forms of agriculture practiced *where it operated*, that its generality reasonably extends to * * * * *." (Emphasis ours.)

U. S. v. Turner Turpentine Co., 111 F. (2) 400.

Congress could have, but did not, restrict the generality of the term "agricultural laborer". It repudiated size of operation, of place of operation, as a criteria and the "common denominator" theory of the lower court as determinative of the extent of exception. The lower court failed to consider and apply the Idaho usual idea and common usage of the term. It even restricted the meaning so as to apply the Act to the farmer and his hired man upon the farm—the so-called "cellar men". Its decision results in confusion, for its result is to confuse the farm laborer with the agricultural laborer in the warehouse, treating both as within the Act; it confuses in that it ascribes a different meaning to the same general words used in different acts of Congress so that the same laborer or employee and employer are not subject to the unemployment provisions of the Social Security Act of Congress, or of the State of Idaho, nor subject to the Fair Labor Standards Act of Congress, but subject to the National Labor Relations Act.

V.

IT WAS ERROR FOR THE BOARD TO JOIN ALL THE PETITIONERS IN ONE PROCEEDING

AND THIS HAS RESULTED IN AN UNCERTAIN, VAGUE AND INDEFINITE DECREE BY THE COURT.

It was error for the Board to join in one proceeding the claims of unfair labor practices against all of the petitioners.

In his concurring opinion Judge Fee said:

"The initial confusion was caused when the attempt was made to organize cellar crews and warehouse crews in one union, notwithstanding the direct language of the Act preventing organization of the agricultural laborer.

"The Board made this confusion worse confounded by entertaining the joinder in one proceeding of a claim of unfair labor practices against (1) a farmer who raised, processed and marketed potatoes of others as a dealer, (2) a non-profit cooperative, grading, sorting and dealing in potatoes of farmer-members, and (3) a traffic association which consisted not only of those above mentioned, but of strict commercial dealers also. * * * * * *

"The Board also complicated the situation, following the lead of the union, by its consideration of an order based upon, and relating without differentiation to, the various types of work done on land in the possession of the farmer, or in his cellar, and work done in commercial warehouses and pro-

cessing of potatoes for shipment in interstate commerce." (R. 792-893.)

The petitioners at all times opposed their joinder in one proceeding (R. 82); the refusal of the Board to separate the various types of persons, firms and corporations, and have separate hearings and separate orders entered has led to the direct result we have here; that is, the utmost of confusion. There is so much confusion that Judge Fee who sat in the case in the Circuit Court states:

> "No language in the order of the Board expressly directs any of the plaintiffs to do, or to cease and desist from doing, anything with respect to members of cellar crews. There is nothing in the order to preclude plaintiffs from assembling such crews of unorganized workers separately from the warehouse crews, or to prevent farmers, either separately or cooperatively, from hiring their own cellar crews. Therefore, the writer concurs in the result. *If the order of the Board could be interpreted by reference to relate to cellar crews, the writer would be compelled to dissent.*" (R. 797.) (Emphasis ours.)

Judge Fee may be correct in his statement that there is nothing in the order of the Board relating to cellar crews or to prevent farmers from disregarding the entire orders insofar as their cellar crews are concerned. However, the Board ordered petitioners to cease and desist from doing certain things, and to do other

things, with respect to the units found by the Board to be appropriate (R. 72) and the Board found that the cellar and warehouse crews of each and every petitioner, exclusive of foremen and supervisory employees, constitute units appropriate for collective bargaining (R. 71).

The Circuit Court entered its order in this case and it covers all employees of the petitioners "in each of the units found above to be appropriate for the purpose of collective bargaining" (R. 799).

Judge Fee apparently believes that the reference to the units in the order of the court does not refer back to cellar crews.

If a contempt proceeding should be initiated against the Idaho farmers, who are petitioners herein, we do not know whether Judge Fee's interpretation of the court's order would be a defense, for it may be presumed as a matter of law that an Idaho farmer is supposed to know more about the meaning of an order of injunction than a Federal Judge who is a member of the court that issues the injunction. Any judgment or order of a court should be sufficiently definite so that it can be understood not only by the litigants but by the enforcing officers.

Hedrick v. Lee, 39 Idaho 42; 227 Pac. 27.

A decree, to be operative, must contain sufficient certainty in itself. It cannot be aided by presumption.

Watts v. Waddle, 6 Peters 389; 8 L. Ed. 437.

This is especially true in orders putting into force and effect an injunction.

21 C.J. 658.

VI.

THE WORDS "AGRICULTURAL LABOR" SHOULD BE CONSTRUED BY THIS COURT BECAUSE OF THEIR USE IN THE SEVERAL ACTS OF CONGRESS AND THE VAST NUMBER OF PEOPLE AFFECTED THEREBY.

The National Labor Relations Act specifically excludes any individual employed as an agricultural laborer. The Fair Labor Standards Act does, and the Unemployment Compensation Act originally did and now more specifically does exclude agricultural labor. The various states have enacted laws which exclude agricultural labor from coverage, especially workmen's compensation laws and unemployment insurance acts. As a result, there is diversity in the decisions as to the meaning of the term "Agricultural Labor".

Whatever may be said as to the difference in the wording of the Acts of Congress, it must be conceded that the rights and liabilities of millions of Americans may be affected by the correct definition of the words "Agricultural Labor".

Organized labor is entitled to know where its legitimate field of organization ends. The numerous per-

sons employed on farms and in the processing of farm products have the right to have finally settled the boundary line between agricultural labor within the meaning of the act, where the employer and employees are not subject to the act and industrial labor, where the employer and employees are subject to the act. The millions of farmers of America and the great cooperative marketing associations composed of farmers are entitled to a clear exposition of the words "Agricultural Labor", so that they will know whether their operations are covered or are not covered and whether they and their employees have the liabilities imposed upon the one, and the rights guaranteed to the order.

We appreciate that this court denied the petition for a writ in the North Whittier Heights Citrus Association, a cooperative marketing organization, but as hereinbefore pointed out, in our opinion, the North Whittier Heights Citrus Association case does not go nearly so far and does not have the implications that this case has.

Judge Fee in his concurring opinion in this case stated:

> "* * * This court should not place the stamp of approval upon the sweeping away of the clause of the Act relating to the agricultural laborer, nor should it, by implication, prejudice the fundamental rights of the farmers who are not parties to this litigation." (R. 796.)

and again

> "* * * If as realists, we take any account of the facts, there is then no obstacle to the extension of like organization and regulation of agricultural laborers in the operations of planting the seed and preparing the ground." (R. 795.)

and Judge Fee likewise said:

> "* * * If the implication of the findings of the Board, as affirmed by the majority, are that he must employ a union crew under such circumstances simply because he also warehouses and sells potatoes bought from others, then no potato grower in Idaho can escape regulation, notwithstanding the plain language of Congress." (R. 794.)

Conclusion

It is respectfully submitted that a writ of certiorari should be issued.

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Dated at Boise, Idaho,
September 18th, 1944.

APPENDIX

National Labor Relations Act, Section 2(3):

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

49 Stat. 450; 29 U.S.C.A. 152.

Fair Labor Standards Act, Sec. 13, provides:

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to * * * * * * (6) any employee employed in agriculture; * * * * * (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; * * *"

29 U. S. C. A., sec. 213, p. 509; 53 Stat. 1256.

FILED
OCT 20 1944
CHARLES ELMORE CROPLEY
CLERK

No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1944

IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE AND L. B. HOLDEN, CO-PARTNERS, DOING BUSINESS AS L. S. TAUBE & COMPANY; MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DOING BUSINESS AS G. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAE O'NEIL, ADMINISTRATRIX OF THE ESTATE OF J. E. O'NEIL, DECEASED; A. G. STUART; C. R. HOLDEN AND L. L. HOLDEN, CO-PARTNERS, DOING BUSINESS AS HOLDEN'S HOOTCHES AND IDAHO TRAFFIC ASSOCIATION, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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Dept. of Labor, Wage and Hour and Public Contracts Divisions, *Memorandum to Industry Committee No. 62 For the Fruit and Vegetable Packing and Farm Products Assembling Industry* (New York, 1943) ---- 17

Federal Trade Commission, *Agricultural Income Inquiry* (Gov't Print. Off., 1938), Part II, p. 345 ---- 15

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 493

IDAHO POTATO GROWERS, INC.; W. P. WILSON; L. S. TAUBE, TED TAUBE AND L. B. HOLDEN, CO-PARTNERS, DOING BUSINESS AS L. S. TAUBE & COMPANY; MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DOING BUSINESS AS S. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAH O'NEIL, ADMINISTRATRIX OF THE ESTATE OF J. E. O'NEIL, DECEASED; A. G. STUART; C. R. HOLDEN AND L. L. HOLDEN, CO-PARTNERS, DOING BUSINESS AS HOLDEN BROTHERS AND IDAHO TRAFFIC ASSOCIATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 749) is not yet reported. The findings of fact, conclusions of

law, and order of the National Labor Relations Board (R. 68–149) are reported in 48 N. L. R. B. 1084.

JURISDICTION

The decree of the court below (R. 798–803) was entered on June 30, 1944. The petition for a writ of certiorari was filed on September 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether individuals employed to perform the work of sorting, grading, weighing, and sacking potatoes for dealers who market potatoes are within the exemption of an "agricultural laborer" under Section 2 (3) of the National Labor Relations Act.[1]

---

[1] While certain other questions are suggested by the petition, they were not raised below and hence are not properly presented. In any event, petitioners' contention (Pet. 13) that the Board order, as enforced, deprives the growers whose potatoes they process, of the right of free speech is particularly without merit since petitioners may not urge the grievances of others. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 558. See also *infra*, note 10. And the complaint as to the vagueness of the order and decree (Pet. 14; Br. 33–37) is equally insubstantial. See *infra*, note 16. If the issue of improper joinder may be said to have been raised below (R. 161, par. 16), albeit obscurely, especially in the absence of a clear showing of prejudice we submit that this is not a question, review of which is warranted.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 2 (3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.
>
> SEC. 10. * * *
>
> (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

Upon charges filed by the Union [2] (R. 5–27) and upon the usual proceedings, the Board, on April 10, 1943, issued its findings of fact, conclusions of law, and order (R. 68–149). The facts as shown by the evidence, may be summarized as follows:

---

[2] Teamsters, Chauffeurs, Warehousemen and Helpers, Local 183, affiliated with the American Federation of Labor.

Petitioners, nine in number,[3] are, with the exception of the Traffic Association, dealers in potatoes in Idaho Falls, Idaho and vicinity.[4] Peti-

[3] (1) Idaho Potato Growers, Inc., an Idaho corporation (herein called "Potato Growers"); (2) W. P. Wilson; (3) L. S. Taube & Company, a partnership consisting of L. S. Taube, Ted Taube, and L. B. Holden (herein called "Taube"); (4) J. Friedman & Sons, a partnership consisting of Meyer Friedman and Arthur E. Friedman (herein called "Friedman"); (5) Idaho Falls Warehouse Company, an Idaho corporation (herein called "Warehouse Company"); (6) Rowenah O'Neil, Administratrix of the Estate of J. E. O'Neil, deceased (herein called "O'Neil"); (7) A. G. Stuart; (8) Holden Brothers, a partnership consisting of C. R. Holden and L. L. Holden (herein called "Holden"); and (9) Idaho Traffic Association, an Idaho corporation (herein called "Traffic Association"). Petitioner Rowenah O'Neil, Administratrix of the Estate of J. E. O'Neil, operates the business formerly conducted by J. E. O'Neil, who died in August 1942 (R. 277). Petitioner Holden operates the produce business formerly conducted by Holden Brothers, Inc., an Idaho corporation, which was dissolved on about June 30, 1942. The two partners in petitioner Holden were two of the three stockholders in the corporation and managed its business until the dissolution, when they formed the petitioning partnership (R. 181–186). The Board found petitioner Holden and O'Neil chargeable under the Act with the unfair labor practices of Holden Brothers, Inc. and J. E. O'Neil, respectively (R. 136–137) and, in each instance, we refer to the predecessor as well as petitioner as "petitioner."

[4] Petitioner Traffic Association is an Idaho corporation with its office at Idaho Falls (R. 296). It was organized for the purpose of assisting shippers with respect "to traffic problems of all kinds, and matters arising out of the preparation, inspection, sale and shipment of merchandise and commodities of whatsoever nature" (R. 733). All petitioner dealers and about seven other potato dealers and shippers hold memberships in the Traffic Association (R. 296–297).

tioner Taube is a partnership with its principal office in Kansas City, Missouri (R. 209–210). This petitioner grows no potatoes but maintains warehouses at Idaho Falls and Shelley, Idaho, for the handling of potatoes which it buys from both growers and dealers for resale (R. 209, 211). During the 1941–1942 season, when the unfair labor practices took place, it sold and shipped from these warehouses approximately 1,000 carloads of potatoes (R. 525). In February 1942, it employed 70 workers in its Idaho Falls and Shelley operations (R. 287–289).

Petitioner Friedman is engaged in the general produce business in various States and maintains a warehouse at Idaho Falls for the handling of potatoes (R. 275). It grows no potatoes but purchases them from growers and other dealers. During the 1941–1942 season, it sold and shipped from its Idaho Falls warehouse approximately 360 carloads of potatoes (R. 275), and, in February 1942, employed 23 workers (R. 290).

Petitioner Warehouse Company, among various business enterprises conducted by it at Idaho Falls, maintains a warehouse for the handling of potatoes (R. 261–263). It grows no potatoes but buys them from growers and dealers for resale and also at times acts as an agent in the handling of potatoes for growers (R. 263–266). About 65 to 85 percent of the potatoes handled by it during the 1941–1942 season were purchased by it for

resale (R. 267–268). During that season, this petitioner shipped approximately 700 carloads of potatoes (R. 268) and in February 1942, employed 23 workers of the type whose status is here in issue (R. 291).

Petitioner O'Neil maintains a warehouse at Idaho Falls for handling potatoes (R. 292). During the 1941–1942 season when the unfair labor practices were committed, this petitioner grew no potatoes [5] but bought from growers and other dealers from 800 to 900 carloads of potatoes (R. 277). In February 1942, its pay roll numbered 31 employees (R. 292–293).

Petitioner Stuart owns and operates a warehouse at Shelley, Idaho (R. 293). He handles, in the course of his operations at Shelley, potatoes grown by both himself and other growers. During the 1941–1942 season, about 95 percent of the potatoes handled by him were bought from other growers (R. 276). During the same season, he sold and shipped approximately 200 carloads of potatoes (R. 276). In February 1942, he employed 10 workers (R. 293).

Petitioner Holden owns and maintains a warehouse at Idaho Falls where it handles potatoes and operates a general produce business (R. 182–183). During the 1941–1942 season it grew no

[5] During the 1942–1943 season, subsequent to the unfair labor practices, petitioner O'Neil began to grow potatoes which formed between 10 and 15 percent of the total amount packed by petitioner (R. 277).

potatoes and sold 739 carloads of potatoes acquired from growers (R. 513).[6] In February 1942, its pay roll included 37 workers (R. 294).

Petitioner Wilson maintains a warehouse for the handling of potatoes at Firth, Idaho (R. 275). Between 10 and 15 percent of the 450 carloads of potatoes shipped by this petitioner during the 1941–1942 season were grown by himself and the remainder was bought by him from other dealers and growers for resale (*id.*). In February 1942, he utilized the services of 26 workers (R. 286).

Petitioner Potato Growers is a cooperative association which sorts, packs, ships, and sells potatoes both for its members and other growers (R. 234–237). It also markets, in carload lots, potatoes acquired from other dealers (R. 237). It carries on a substantial portion of its operations in the vicinity of Idaho Falls and Shelley and maintains a warehouse at each of these places (R. 243, 255). During the 1941–1942 season, it shipped approximately 1,300 carloads of potatoes in the course of its operations in these vicinities (R. 254–255). In February 1942, it employed 111 potato workers (R. 280–284).

[6] Subsequent to the unfair labor practices, during the 1942–1943 season which was prior to the Board hearing, this petitioner shipped 106 cars of potatoes, of which 71 cars were grown on land owned or leased by petitioner and the remainder purchased by petitioner from other growers (R. 513).

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In connection with the above-described business of handling potatoes, either as dealers or sales agents, petitioners, other than the Traffic Association, sort, grade and pack potatoes of growers and other dealers, and, for that purpose, maintain suitable equipment and regular staffs of potato workers, called warehouse and cellar crews, these being the employees, approximately 331 in number, whose status is here in issue (R. 212–213, 273–274). Almost all of the potatoes acquired by petitioner dealers are processed by these workers rather than by the growers or their employees (R. 211, 270–271, 276–277).[7]

Much of the work of the crews is not only specialized, but must be done very rapidly and expertly (R. 582). Training and experience are necessary for many operations, especially for those of the head sorter, who normally has had from two to four years of experience at the other jobs on the sorter machine before attaining that position (R. 538–540, 581–585). Thus, the sorters must be able to distinguish quickly between the "Number 1" and "Number 2" grades of pota-

[7] The status of those employed by the grower who sells his potatoes to petitioner dealers already processed is not here in issue. On occasion when petitioners prepare the potatoes for market, the grower may furnish one or more farm hands to assist temporarily in the work, but these hands enter into no relationship with petitioner dealers, are not carried on their pay rolls as are the regular potato workers, and are not involved in the instant proceeding (R. 240–241, 585–586, 609–610).

toes, to detect wire worm, and to save potatoes in certain instances by a process known as "clipping" (R. 581–584). Upon them rests the responsibility for avoiding rejection of potatoes on government inspection after they have been finally packed (R. 582). Likewise, although to a lesser degree, the jiggers and sewers must have experience and training in order properly to pack, weigh, and sew the potato sacks (R. 584–585). Although the potato workers are seasonal employees, it is established practice for the dealers, upon application at the beginning of each season, to rehire satisfactory employees from the preceding season (R. 198, 223, 246–247).

The work of the dealers' crews may be done and is done either at the dealers' warehouses or in the growers' cellars "in the country" (R. 190, 196, 218–219, 514, 540–541). During a rush period of approximately four to six weeks in the fall of the year, much of the work is done from start to finish in the dealers' warehouses (R. 514). When the crews work in the farmers' cellars, they frequently give the potatoes only a rough sorting, known as "roughing" or "scalping" (R. 508), pack them temporarily in "dump" bags owned by the growers or rented to them by the dealers (R. 532–533, 715), and truck them to the dealers' warehouses, where the culls are removed, a more careful grade is made, and the potatoes are finally packed for shipment (R. 190–191, 217–219, 241–

243, 274).[8] In many instances, the potato workers also wash the potatoes at the warehouse after a preliminary "roughing" in the country (R. 191, 218, 243).

Whether they work in the dealers' warehouses or in the farmers' cellars, the potato workers are under the supervision of the dealers' warehouse foremen, and when working "in the country" they are also under the immediate direction of the dealers' crew foremen, who accompany them to the growers' farms (R. 220, 248). These supervisors have the usual powers and responsibilities of foremen with respect to the potato crews, including the direction of their work and, at least in some cases, the power to hire and fire (R. 248, 656). The farmers have no control or supervision over the workers' operations, although they frequently watch the grading and sorting of their potatoes; the attention which the grower thus directs to the grading process is merely to assure himself of fair treatment at the hands of the dealer's crew, of grading that is not too strict, and of handling costs that are not inflated by slow or

[8] During the 1941–1942 season, approximately 70 to 75 percent of the potatoes handled by petitioner Friedman's country crews received only a rough sorting "in the country" and were finally sorted and packed at the warehouse (R. 276). In the cases of petitioners Warehouse Company, Wilson, and Stuart, the corresponding percentages were, respectively, 60 percent, 50 percent, and 40 percent (R. 269–270, 275, 276–277).

inefficient work (R. 228–230, 249–250, 587–588, 608–609, 661–663).[9] When the performance of the crew displeases the farmer, his course usually is to complain to the foreman; if unreconciled to the foreman's disposition of the complaint, to appeal from the foreman's adverse decision to the dealer's manager or other representative; and occasionally, to have the crew stop working until a responsible representative of the dealer comes to the farm to adjust the farmer's grievance (R. 228–230, 249–252, 257–258, 661–663). Ultimate decision rests with the dealer, however, not with the farmer (R. 257–258) who, in attempting to see to it that the work of the crews is done in a manner most favorable to his own interests, merely exerts upon the crews' employer, the dealer, the normal influence of a "customer" (R. 668–669, 675–676).

The Board found that the potato workers are not agricultural laborers within the meaning of the Act (R. 70, 92), that all the petitioners refused to bargain collectively with the Union, which was the representative designated by a

[9] The price which the grower receives for his crop is subject to reduction in the amount of the sorting and packing costs incurred by the dealer, who normally pays the wages of the potato workers and deducts the amount of the payment from the price which would otherwise be payable to the growers (R. 273, 190–191, 193–194, 233, 664–665, 692–693). Occasionally, a grower pays the wages of a member of a regular crew of potato workers with his own check (R. 693).

majority of the employees in appropriate bargaining units, in violation of Section 8 (5) of the Act, and, that by this and other conduct,[10] petitioners interfered with, restrained, and coerced the potato workers in violation of Section 8 (1) of the Act (R. 70, 98–99, 134–139). It further found that petitioner Taube had discriminatorily discharged employee Moore, and petitioner Potato Growers had discriminatorily discharged employee Rash in violation of Section 8 (1) and (3) of the Act (R. 70, 103–104, 117).[11]

The Board ordered petitioner dealers, and the Traffic Association when acting as an agent for, or in the interest of, petitioner dealers, to cease and desist from their unfair labor practices, and to bargain collectively, upon request, with the Union. It also ordered petitioners Taube and Potato Growers, respectively, to pay appropriate back pay to employees Moore and Rash[12] and required all petitioners to post notices (R. 71–76).

On July 8, 1943, petitioners filed a petition in the Circuit Court of Appeals for the Ninth Circuit to review and set aside the Board's order (R. 150–162). The Board requested dismissal of

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[10] It was petitioners' instigation of farmers' protest meetings which the Board treated as evidence of unfair labor practices, and not the protest speeches themselves.

[11] The Board dismissed the complaint insofar as it alleged discrimination as to the tenure of five additional employees (R. 76).

[12] Neither of these employees desired reinstatement (R. 601, 615).

the petition for review and enforcement of its order (R. 163–172). On June 30, 1944, the court below handed down its decision and decree enforcing the Board's order in full (R. 749–791, 798–803) and on July 14, 1944, District Judge Fee filed a concurring opinion (R. 791–797).

ARGUMENT

The Board and the court below, upon full consideration of the relevant facts, determined that the petitioner dealers' crews of potato workers are not agricultural laborers within the meaning of Section 2 (3) of the Act. The result is in plain accord with the Congressional intent and no conflict of decisions is raised by the court's holding, which follows the reasoning of its earlier decisions in *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724, and *National Labor Relations Board* v. *Tovrea Packing Co.,* 111 F. (2d) 626, certiorari denied, 311 U. S. 668.

The above-detailed facts show that the sorting, grading, and packing of potatoes is not primarily an incident of agriculture but is an aspect of a marketing process. The employees whose status is here in issue are not in the service of farmers but of merchant-shippers, only a few of whom are also engaged in growing potatoes.[13] The portion

[13] The pattern defined by the facts herein is typical. "Probably 85 percent of the [Idaho potato] shipments are graded

of the work which is done in the farmer's cellar is functionally coherent with the warehouse operation and is performed by the same employees and for the same employers as is the warehouse operation.[14] Whether the work is done in cellar or warehouse, it is an integral part of a marketing process which is financed and administered by dealers. Nor may the work be assimilated into the sphere of agriculture by the fact that, in some instances, final grading and sorting are completed in the farmer's cellar.[15] Indeed, the fact that the farmer confides the preparation and marketing of his potato crop to a specialist even when the work may be done on his own premises further emphasizes its non-agricultural character.

The workers here involved are engaged in a specialized and integrated operation wholly divorced from the raising and harvesting of the

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and sized by dealers or contract crews hired by them, and 15 percent by growers." Park, *Marketing the Late Crop of Potatoes* (U. S. Department of Agriculture, Circular No. 475, 1938), p. 35.

[14] The Board included both warehouse and cellar crews in an appropriate unit (R. 70–71, 120–121). The scope of the unit is entirely clear and petitioners' suggestion that it is ambiguous (Br. 34–37) is urged here for the first time. In their answer petitioners admitted the appropriateness of a unit comprising warehouse and cellar crews (R. 62), as alleged in the complaint (R. 52–53).

[15] The prevailing practice in Idaho is to regrade the potatoes in warehouses over power sorters before loading. See Sherman, Fiske and Park, *Marketing Late-Crop Potatoes* (U. S. Department of Agriculture, Farmers Bulletin No. 1578, 1929), p. 30.

potato crop.[16] It is forwarded not by the casual labor of a versatile farm hand but by an experienced corps of workers who are regularly engaged for the work. It is a mechanized operation and those who perform it are, in contrast to agricultural laborers,[17] paid at an hourly rate (R. 728–730), as is usually the case with industrial labor. All of the incidents of their relationship are appropriate subjects for collective bargaining. Compare *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. C. A. 9), certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724.

In applying the Act to the instant employees, the Board has sought to preserve a distinction, long developed in its administrative experience[18]

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[16] See Report of the Federal Trade Commission, *Agricultural Income Inquiry* (Gov't. Print. Off., 1938), Part II, p. 345; Park, *op. cit., supra,* at p. 10.

[17] See, for example, Reports and Analysis Division, War Manpower Commission, *Idaho Agricultural Labor Reports* (Boise, Idaho, 1943).

[18] See, for example, the following cases holding employees not to be agricultural laborers: *Matter of American Fruit Growers,* 10 N. L. R. B. 316, 326–329; *Matter of George G. Averill,* 13 N. L. R. B. 411; *Matter of Grower-Shipper Vegetable Ass'n of Central California,* 15 N. L. R. B. 322, enforced in 122 F. (2d) 368 (C. C. A. 9) (lettuce packers); *Matter of North Whittier Heights Citrus Fruit Association,* 10 N. L. R. B. 1269, 1277–1284, enforced in 109 F. (2d) 76 (C. C. A. 9), certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724; *Matter of Sierra Madra-Lamanda Citrus Ass'n,* 23 N. L. R. B. 143; *Matter of Upland Citrus Ass'n.,* 24 N. L. R. B. 1136; *Matter of Corona Citrus Ass'n,* 25 N. L. R. B. 77; *Matter of Jameson Co.,* 25 N. L. R. B. 64; *Matter of Sea-*

as well as in authoritative texts[19] between those who perform agricultural labor and those who are engaged in the marketing and processing of agricultural products. The language of the Act warrants this differentiation and where Congress has sought to eliminate it, it has done so in unmistak-

board Lemon Ass'n., 28 N. L. R. B. 273; *Matter of Saticoy Lemon Ass'n.*, 28 N. L. R. B. 1214 (employees of cooperative associations composed of growers who pack and grade citrus fruit); *Matter of Tovrea Packing Co.*, 12 N. L. R. B. 1063, enforced in 111 F. (2d) 626 (C. C. A. 9), certiorari denied, 311 U. S. 668 (cattle feeders who prepare cattle for market); *Matter of California Walnut Growers Exchange*, 18 N. L. R. B. 493 (walnut shellers at plants owned by walnut growers' cooperative marketing association); *Matter of Antonio Tomasello*, 46 N. L. R. B. 375 (tomato packers who pack grower's tomatoes as well as those purchased by him from others and some of whom have participated in the planting and raising of the tomatoes); *Matter of Newday Seeds*, 55 N. L. R. B. 1049 (seed processors; fact that employees work as farm hands during certain seasons of the year does not change their status when engaged in processing); *Matter of American Food Products Corp.*, 55 N. L. R. B. 654 (workers in potato dehydrating plant); *Matter of J. R. Simplot*, 55 N. L. R. B., No. 223 (potato sorters and graders held to be employees of dealers; head sorter is not an independent contractor but employee of dealers).

Cases holding employees to be agricultural laborers; *Matter of Stark Bros. Nurseries & Orchards Co.*, 40 N. L. R. B. 1243 (employees engaged in fertilizing, cultivating, and harvesting crops and nursery stock); *Matter of Saticoy Lemon Ass'n*, 41 N. L. R. B. 243; *Matter of Seaboard Lemon Ass'n*, 41 N. L. R. B. 248 (lemon pickers engaged at growers' orchards in the harvesting of lemons); *Matter of H. J. Heinz Co.*, 49 N. L. R. B. 573 (employees engaged in growing tomatoes); *Matter of Kennecott Copper Corp.*, 51 N. L. R. B. 1140, 1152–1153 (dairy field hands).

[19] U. S. Department of Agriculture, Circular No. 94, *Farmers' Cooperative Associations in the United States, 1929*

able terms as in the Fair Labor Standards Act[20] and the 1939 amendments to the Social Security Act.[21]

Finally, "where the question", as here, "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited"; "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 131.

(Gov't Print. Off., 1929), p. 3; Clark and Weld, *Marketing Agricultural Products in the United States* (New York, 1932), p. 3; Huebner, *Agricultural Commerce* (New York, 1924), p. 1; U. S. Department of Commerce, Bureau of the Census, *Census of Business: Wholesale Distribution: 1935*, Vol. I, p. 45; U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, *Memorandum to Industry Committee No. 62 For The Fruit and Vegetable Packing and Farm Products Assembling Industry* (New York, 1943).

[20] Sec. 13 (a) (10), 52 Stat. 1067, 29 U. S. C. 213 (a) (10).

[21] Sec. 209 (b) (1), (l) (4), 53 Stat. 1373, 42 U. S. C. 409 (b) (1), (l) (4). In 1943, the Idaho legislature expanded the agricultural labor definition, which had theretofore been confined to employees of the farm operator and to marketing activities incident to the ordinary farming operations of the farmer himself, to include the broader exemption contained in the 1939 amendments to the Social Security Act. Compare Idaho S. L., Ch. 182, Sec. 18–5 (f), pp. 392–394, with 1943 Idaho S. L., Ch. 29, pp. 60–61.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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